Supreme Court, U.S.
FILED

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No.

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**IN THE**

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1996**

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JANET L. VAUGHT, ET AL,
*Petitioner*

v.

SHOWA DENKO, ET AL,
*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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SILVESTRI & MASSICOT
Frank A. Silvestri
3914 Canal Street
New Orleans, Louisiana 70119
(504) 482-3400
Counsel Of Record For Petitioners
Janet Vaught, Alan Vaught,
and Mitchell Vaught

LAW OFFICE OF PETER D. DERBES
Peter D. Derbes

9/24/97

## QUESTION PRESENTED

The Fifth Circuit Court of Appeals found that Texas's tolling rule "clearly conflicts with the well-established federal practice on class action tolling." Nevertheless, the court held that an intermediate state appellate court could proscribe the limits of FRCP 23's tolling effect.

The question presented here is:

**Does a pending FRCP 23 class action toll limitations for all putative class members regardless of whether the claim is based on a federal or state cause of action ?**

## LIST OF PARTIES

1. Janet Vaught (Petitioner)
2. Alan Vaught (Petitioner)
3. Mitchell Vaught (Petitioner)
4. Showa Denko K.K. (Respondent)
5. Showa Denko America, Inc. (Respondent)
6. Leiner Health Products, Inc. (Respondent)
7. Pharmavite Corporation (Respondent)
8. General Nutrition Incorporated (Respondent)
9. General Nutrition Corporation (Respondent)
10. General Nutrition Products, Inc. (Respondent)
11. Walgreen Co. (Respondent)
12. Eckerd Holdings II, Inc. (Respondent)
13. Frank A. Silvestri (Counsel for Petitioners)
14. John P. Massicot (Counsel for Petitioners)
15. Kathleen Robbins (Counsel for Petitioners)
16. Peter D. Derbes (Counsel for Petitioners)

17. Silvestri & Massicot (Counsel for Petitioners)

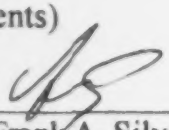
18. Roland Foster (Counsel for Respondents)

19. James Juneau (Counsel for Respondents)

20. Strasburger & Price, LLP (Counsel for Respondents)

21. Sara D. Schotland (Counsel for Respondents)

22. Cleary, Gottlieb, Steen & Hamilton (Counsel for Respondents)



Frank A. Silvestri, Counsel for Petitioners

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## PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Janet L. Vaught et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 10, 1997, in order to resolve the conflict between the Fifth Circuit and the Eighth and Tenth Circuit Courts of Appeals as well as this court's own precedent on the important issue presented herein.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published at 1997 WL 10459, ___ Fed.3d ____. It is reprinted in the Appendix hereto at page App. 1. By order filed April 8, 1997, the Fifth Circuit denied the Petition for

Rehearing and Suggestion for Rehearing En Banc. App. 34.

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## JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1) from the judgment rendered in this civil matter by the United States Court of Appeals for the Fifth Circuit.

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## STATUTE INVOLVED IN THIS CASE

The limitations tolling effect of Rule 23 of the Federal Rules of Civil Procedure is in issue in this case. Rule 23 is reproduced at App. 36.

## STATEMENT OF THE CASE

### Course of Proceedings

The Vaughts filed suit in Texas State Court on April 28, 1993. Defendants removed the action to the United States District Court for the Southern District of Texas, Houston Division. In June 1994, the panel on multi-district litigation ordered the transfer of the case to the United States District Court for the District of South Carolina, so that it could be joined with the pending nation-wide tryptophan litigation there (MDL No. 865). In September 1995, the case was conditionally remanded from the South Carolina court to the District Court for the Southern District of Texas for further proceedings and trial. Showa Denko subsequently, and successfully, moved for summary judgment on limitations grounds. In an opinion dated March 10, 1997, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. App. 1. On April 8,

1997, petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc were denied. App. 34.

**Statement of the Facts**

The facts germane to this petition are simple and undisputed. In 1990, a personal injury class action lawsuit was filed in accordance with Rule 23 of the Federal Rules of Civil Procedure by Lois Rapoport and others in the United States District Court for the District of South Carolina against Showa Denko, Respondent herein. The suit was filed on behalf of all EMS victims nationwide. Around that same time, petitioner Janet Vaught, who had consumed L-tryptophan, observed that certain symptoms and ailments from which she was suffering appeared similar to those associated with EMS. Over the course of the next three years, she went from one medical specialist to another to determine the cause of her problem. Both the trial and appellate courts made the specific finding that

Mrs. Vaught was diligent in her attempt to ascertain the cause of her symptoms. She was consistently told at that time that she did not have EMS. In January 1992, the South Carolina Federal court denied certification of the L-tryptophan class action. In April 1993, Janet Vaught was diagnosed with EMS, and she promptly filed her individual suit against Showa Denko in Texas.

All parties concede that Vaught's action filed in April 1993 was timely under Texas's two year statute of limitations governing her claim, if the filing on her behalf of the South Carolina federal class action is deemed as a matter of law to have tolled the statute of limitations against her individual claim. The Texas District Court and the Fifth Circuit concluded that Vaught received no tolling benefit from the South Carolina class action and dismissed her case.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion conflicts with the decisions of the Eighth Circuit in *Adams Public School District v. Asbestos Corp.* and the Tenth Circuit in *Sawtell v. E.I.DuPont DeNemours and Co., Inc.* and is contrary to the policies embodied in this Court's decisions in *American Pipe and Construction Co. v. Utah* and *Crown, Cork and Seal Co. v. Parker,* which stand for the proposition that the filing of a putative class action pursuant to FRCP 23 tolls the running of limitations for all purported class members.

**FRCP 23 and Federal Tolling Policy**

Janet Vaught contends that her complaint was timely filed under *American Pipe* because, as a putative member of the *Rapoport* federal class action, the statute of limitations against her claim was tolled pending a resolution of the class certification issue in the South Carolina Federal District Court. The obvious rationale behind the *American Pipe* rule is the furtherance of judicial

economy:

> [The difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated, and **there remain no conceptual or practical obstacles in the path upholding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined**. Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a "separate cause of action" which must individually met the timeliness requirements, such a concept is simply inconsistent with Rule 23 as presently drafted. **A federal class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage unnecessary, filing of repetitious papers and motions**.

*American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 550, 94 S.Ct. 756, 765, 38 L.Ed.2d 713 (1974) (emphasis added, footnote and citation omitted). Although *American Pipe* and *Crown, Cork and Seal v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) both

involved the tolling of statutes of limitation applicable to federal causes of action, the *American Pipe* rule has been extended to causes of action arising under state law by the Eighth and Tenth Circuits. In *Adams Public School District v. Asbestos Corp.*, 7 F.3d 717 (8th Cir. 1993), the Eight Circuit found the federal interest in the Rule 23 class action tolling policy sufficiently strong to justify its application in a diversity case where state law afforded no such relief. 7 F.3d at 719. In *Sawtell v. E.I.DuPont DeNemours and Co., Inc.*, 22 F.3d 248 (10th Cir.1994), the plaintiff did not prevail because she was a New Mexico resident and the Rule 23 class action had been brought only on behalf of Minnesota residents. Still, the Tenth Circuit cited *American Pipe* and *Crown, Cork & Seal* for the rule that, "[t]he filing of a class action tolls the statute of limitations for all asserted class members, and the statute remains tolled "until class certification is denied." 22 F.3d at 253. In

*Kennedy v. Showa Denko, K.K.*, Civil Action 94-312(M), U.S.D.C., D.N.M. (July 26, 1995), App. 40, the rule was properly applied in an identical products liability action against this Respondent. The *Rapoport* class action was deemed to toll limitations for the plaintiff, a New Mexico EMS victim..

**Vaught**

The Fifth Circuit's decision in *Vaught* holds that the statute of limitations running against a Texas personal injury claimant's right of action is not tolled by the filing, in another state, of an FRCP 23 nationwide federal class action, even if that federal class action includes the Texas claimant as a putative class member. The decision conflicts with the Eight and Tenth Circuit Courts of Appeals' decisions on the tolling effect of Rule 23 and the holdings of this court in *American Pipe* and *Crown, Cork and Seal Co.* Further, the decision subverts the policies

underlying FRCP 23, will engender inconsistent results and unequal treatment of litigants, will disrupt the orderly and efficient administration of the federal courts, and will impose needless burden and expense on plaintiffs and defendants alike.[1] For those Texas plaintiffs who presently are putative members of pending, but uncertified, federal class actions, the consequences of the Fifth Circuit's opinion are ominous. The decision means that hundreds, if not thousands, of Texas breast implant, asbestos, and other class claimants' cases are now, arguably, prescribed.

Since it is unclear from the Fifth Circuit's opinion whether there would be tolling even if a class were finally

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[1] The consequences of this decision for Texas litigants wishing to participate in future personal injury federal class actions are more than troublesome. Since the filing of any Rule 23 personal injury class action in a non-Texas court now lacks tolling effect as to the typical Texas victim's claim arising under Texas law, Texas claimants are now *de jure* non-participants as far as Rule 23 class actions. The Fifth Circuit's opinion regards their claims as never having been asserted in the Rule 23 proceeding, and the Texas two-year statute of limitations runs inexorably against them if the class action is ultimately not certified.

certified, claimants everywhere will be forced to adopt a "belt and suspenders" mentality, compelling them to clog both federal and state court dockets with repetitive individual personal injury suits as insurance against the chance that their individual causes of action will be lost.

Ironically, Texas has previously applied the *American Pipe* rule to state law class actions brought in its own courts:

> The United States Supreme Court has held that the filing of the original class suit suspends the applicable statute of limitations as to all asserted members of the class. *Crown, Cork and Seal... American Pipe...* The statute of limitations remained tolled for all members of the class until class certification is denied. At that point, class members may elect to file individual suits or to intervene as plaintiffs in the original action... We hold that even though the statute of limitations on a class member's individual cause of action would expire during the pendency of a class action, the filing of the class action suspends the applicable statute of limitations as [to] all purported members of the class. Thus, the right to pursue an

> individual cause of action is not foreclosed by decertification of the class. Any time remaining on the statute of limitations of the unnamed property owner's individual cause of action on the date of the filing of the lawsuit was restored and began to run again on the date the class was decertified.

*Grant v. Austin Bridge Construction Co.*, 725 S.W.2d 366, 370 (Tex.App.-Houston [14th Dist] 1987). *Grant*, decided six years before Petitioners filed their individual suit, drew no distinction between the tolling effect of class claims for property damages and class claims for personal injury damages. Two years after Vaught filed suit, a different intermediate Texas appellate court stated, in what the Fifth Circuit concedes was *dicta*, that Texas's two-year tort statute of limitation was not tolled by the filing of a federal personal injury class action. *Bell v. Showa Denko*, 899 S.W. 2d 749 (Tex. App.-Amarillo, 1995).[2]

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[2] The *Bell* court concedes that the *American Pipe* tolling issue was never properly raised or litigated in the trial court, 899 S.W. at 757, and was able to dismiss the suit on other limitations grounds. Its *American Pipe* analysis was entirely gratuitous. The

Following *Bell*, the Fifth Circuit held herein that an intermediate state court opinion nullifies the uniform tolling effect of Rule 23.

The Fifth Circuit's decision concedes, tellingly, that Texas' tolling rule, as stated in *Bell*, "clearly conflicts with the well-established federal practice on class action tolling." App. 33. Nevertheless, the Fifth Circuit held that Rule 23 is trumped by *Bell*. That conclusion is based on a glaring misconception of the nature of Texas's tolling rule, revealed in the Court of Appeals's statement that Texas's "tolling rule is 'an integral part' of its statute of limitations" (citing *Byrd v. Blue Ridge Cooperative*, discussed *infra*), which reflects "a deliberate policy choice

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Fifth Circuit concluded that since "carefully developed and supported" alternative holdings of the Texas Supreme Court have the effect of law, so too do the decisions of the Texas Court of Appeal sitting in Amarillo. There is no authority to support that contention, and since there was no *American Pipe* record made in the trial court, *Bell's* discussion of the issue hardly qualifies as "carefully developed and supported".

by its legislature." App. 33. This is simply not so.

First, Texas' two-year statute of limitations makes ***no*** mention of tolling. Tex. (Civ. Prac. & Rem.) Code Ann. §16.003. App. 61. Furthermore, the proposition that there is no tolling in personal injury class actions does ***not*** reflect a policy choice by the Texas legislature. It is entirely a judge-made rule issuing solely from *dicta* in the *Bell* case that is contradicted by another Texas intermediate appellate court decision, *Grant,* supra. It is ironic, then, that the Fifth Circuit discounts the jurisprudential gloss on Rule 23 by dismissing *American Pipe* toling as "a judge-made practice." App. 29.

*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), does not oblige federal courts to adopt a state law or rule of decision which challenges a federal court's competency *qua* court, or which is not bound up with the substantive law giving rise to the

diversity action, or which threatens the federal court's interest in self-regulation, administrative independence or self-management. Such state laws and rules of decision can and should be superceded.

This court in *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), allowed a state law tort defendant's "statutory employer" status to be decided by the jury and not by the judge as required by the forum state's jurisprudence. With regard to the state's jurisprudential rule requiring a bench determination of statutory employer status this court found:

> We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the [statutory employer immunity] statute. Thus, the requirement appears to be merely a form and mode of enforcing the immunity... and not a rule intended to be bound up with the definition of the rights and obligations of the parties...
>
> * * * The policy of uniform enforcement of state created rights and obligations ...

> cannot in every case exact compliance with the state rule — not bound up with rights and obligations — which disrupts the federal system of allocating functions between judge and jury.

356 U.S. at 536, 537-38 (citations omitted).

Under *Byrd*, a federal court sitting in diversity may disregard a state tolling rule. *Board of Regents v. Tomanio*, 446 US 478, 485, 100 S.Ct. 1790, 64 L.Ed.2d 713 (1980). A state tolling rule will generally govern in diversity actions absent a direct conflict between a state rule and an overriding federal rule or affirmative countervailing federal consideration. *Cook v. G.D. Searle and Co.*, 795 F.2d 800, 803 (10th Cir. 1985). Under *Byrd*, the Texas non-tolling rule (as stated in *Bell*) must be displaced because it conflicts with the established federal tolling practice of Rule 23 promulgated in *American Pipe* and *Crown, Cork and Seal*.

Arguably, *Byrd* was decided as it was because any

state statute or rule of decision must yield to the Seventh Amendment right to jury trial. However, this Court subsequently went on to rule, consistent with the Supremacy Clause, that state rules of decision may be preempted by the Federal Rules of Civil Procedure. In *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), this court concluded that FRCP 4's domiciliary service provision trumped Massachusetts's state statute requiring in hand service of pleadings on executors, despite the fact that the state rule requiring personal service was incorporated in the same statute establishing the limitations period. (Compare to the situation herein where the Texas statute of limitations is silent on the tolling issue.) The result in *Hanna* was to reverse a judgment on limitations grounds based on the alleged failure to toll the statute of limitations in the manner dictated by the state statute. This court concluded its opinion as follows:

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the enabling act. 380 U.S. 460, 473-474.

Simply put, state court decisions cannot be permitted to define the contours of the Federal Rules of Civil Procedure. The Fifth Circuit's decision holds that a single intermediate state appellate court can dictate to the federal courts the manner and timeliness of claims brought before them pursuant to Rule 23, in complete derogation of the policies underlying that Rule. That determination is a slap at the self-regulation and administrative independence of the federal judiciary. By limiting the right of Texas litigants to avail themselves of the economies of Federal Rule 23 class actions, more individual civil actions will have to be filed against class defendants, in both federal and state courts. These needless filings will impose an

unnecessary further burden on federal judicial resources, plainly implicating the federal courts' right of self-management.

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## CONCLUSION

This court must decide which has more bearing in determining the reach of Rule 23: the policy underpinnings of the Federal Rules of Civil Procedure as expressed in the precedent of this Court, or the *dicta* of an intermediate Texas state appellate court.

As the Eighth Circuit found in *Adams*:

> Indeed we view the federal interest here as sufficiently strong to justify tolling in a diversity case when the state law provides no relief.

*Adams, supra,* 7 F.3d at 719. So should this court ultimately find here, consistent with its expressed policy on the scope of Rule 23's tolling effect.

The Fifth Circuit's decision ignores *American*

*Pipe's* holding that the Rule 23 class action be viewed not as a mere "invitation to joinder" but as "a truly representative suit designed to avoid, rather than discourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550. It subjugates a well established federal tolling policy to the vagaries of state appellate precedent. It balkanizes the Rule 23 class action. The statement of the purpose of Rule 23 expressed by this court in *American Pipe* and *Crown, Cork & Seal* should apply with equal vigor to a federal class action brought under state law for personal injuries.

As a matter of law, Janet Vaught was encouraged — not so much by the strict holding of *American Pipe* as by the text and spirit of Rule 23 itself — to refrain from filing a redundant lawsuit, to avail herself of a ***federal*** procedural device which relieved putative ***federal*** plaintiffs like her of the necessity of further burdening an overtaxed judicial

system with claims already asserted on her behalf in a ***federal*** class action proceeding. The Fifth Circuit erroneously penalized her and her family for lacking the prescience to know that the Texas Court of Appeal in Amarillo could, and would, have a hand at rewriting the Federal Rules of Civil Procedure.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SILVESTRI & MASSICOT

BY: _____

Frank A. Silvestri (La. Bar. #12075)
John Paul Massicot
3914 Canal Street
New Orleans, LA 70119
(504) 482-3400

LAW OFFICE OF PETER D. DERBES

BY: _____

Peter D. Derbes
3914 Canal Street
New Orleans, LA 70119
(504) 486-5006

Counsel of Record for Petitioners Janet Vaught, Alan Vaught, and Mitchell Vaught

**VERIFICATION AND CERTIFICATE OF SERVICE**

I certify I am a member of the bar of the Supreme Court of the United States, that all facts and allegations contained in the foregoing Petition for Writ of Certiorari are true and correct to the best of my knowledge and belief and that I have served a copy of the foregoing Petition For Certiorari on the following counsel of record by placing same in the first class mail service of the United States Postal Service, postage prepaid, this ___ day of June, 1997.

Ms. Sara Schotland
CLEARY, GOTTLIEB
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

Rowland Foster
Mark M. Donheiser
STRASBURGER & PRICE
Suite 4300
901 Main Street
Dallas, TX 75202
(214) 651-4300
Attorneys for Respondents

_____
Frank A. Silvestri, Counsel
of Record for Petitioners

Sworn to and subscribed before me, Notary, this___ day of June, 1997.

_____
NOTARY PUBLIC

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-20200

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JANET L. VAUGHT et al.,
Plaintiffs-Appellants,

versus

SHOWA DENKO K.K. et al.,
Defendants-Appellees.

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Appeals from the United States District Court
for the Southern District of Texas

---

March 10, 1997

Before HIGGINBOTHAM, SMITH, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For this diversity action, the key issues at hand are when the limitations period began running under Texas law for the Vaughts' cause of action arising out of Janet L. Vaught's use of L-tryptophan, a nutritional supplement, and whether her membership in a putative federal class action in another State

tolled the Texas limitations period until class certification was denied. Asserting, *inter alia*, that a diligent, but fruitless, inquiry was made as to whether the Vaughts had a cause of action, the Vaughts challenge the summary judgment granted Defendants on limitations grounds. We AFFIRM.

I.

In August 1987, while hospitalized for injuries received in an automobile accident, Janet Vaught (Vaught) was prescribed L-tryptophan, an over-the-counter nutritional supplement. She had never taken this product. After her hospitalization, however, she continued to take L-tryptophan for several months pursuant to prescription purchases. In late 1987 or early 1988, she began to experience various unexplained physical symptoms: fatigue, swollen neck glands, sore throats, body aches, burning sensations, tingling on her legs, and muscle and joint pain. She stopped taking L- tryptophan in December 1988, when she learned that she was pregnant.

On 4 April 1990, Vaught read a newspaper article about an action filed by a Houston, Texas, lawyer on behalf of a woman

who allegedly contracted eosinophilia myalgia syndrome (EMS) from L-tryptophan. EMS is a multisystemic disorder characterized by severe muscle and joint pain, swelling of the arms and legs, skin rash, fever, and sometimes neuropathy, resulting in paralysis and death. In the fall of 1989, the Food and Drug Administration (FDA) established that over 280 cases of EMS were connected to the ingestion of L-tryptophan, a "virtually unequivocal" epidemiological link. As a result, the FDA issued a nationwide, mandatory recall of L-tryptophan in late November 1989.

Vaught noticed that she suffered some of the same symptoms that the newspaper article described as indicative of EMS, such as fatigue, stiffness, and muscle and joint pain. She contacted a paralegal (now the Vaughts' lawyer) in the Houston lawyer's office, to obtain information about EMS, although Vaught contends that she did not think she had EMS at that time. Her contact with that law firm led her to contact two doctors conducting an EMS study at Baylor University Medical School, Drs. Harati and McKinley.

Dr. McKinley sent her an "L-tryptophan Eosinophilia-Myalgia Patient Data Sheet". When Vaught began filling out the questionnaire on 18 April 1990, she thought she might have EMS, so she called the Baylor doctors for their opinion. Vaught spoke with each of them at the end of April.

Also in April 1990, after reading the newspaper article, Vaught contacted Dr. Keichian, who had treated her for her automobile accident injuries, and told him that she had taken L-tryptophan. Dr. Keichian ordered a blood test, and on 25 April told Vaught that her eosinophil levels were normal and that she did not have EMS.

That June, Vaught arranged to have an examination done by one of the Baylor doctors, Dr. Harati. She brought her medical records and the completed Patient Data Sheet to the examination. Once again, she was advised that she had normal eosinophil levels in her blood and did not have EMS. Dr. Harati referred Vaught to Dr. Croock, a Baylor University rheumatologist, for further evaluation.

Vaught was examined by Dr. Croock on 13 July 1990;

he told her that she was not suffering from EMS but from fibromyalgia or fibrositis. He gave Vaught information on fibromyalgia and prescribed Elavil, a tricyclic antidepressant used primarily for treating that ailment.

Vaught took Elavil for approximately six months, and her condition improved somewhat. Her symptoms, however, never completely disappeared, in spite of her attempts at other curative measures, such as physical therapy.

By the end of 1992, Vaught's condition worsened; she experienced dizziness, fainting spells, and respiratory and gastrointestinal problems. In late 1992 or early 1993, she again became concerned that she might have EMS. She contacted her family physician, Dr. Fields. And in January 1993, she consulted Dr. Patton. That February and March, she underwent muscle and sural nerve biopsies to rule out EMS. Dr. Fields then recommended Vaught to Dr. Burns; in April 1993, he diagnosed EMS on the basis of Vaught's biopsies, medical records, exams, and blood work.

Vaught contacted the paralegal with whom she had

spoken in 1990 and who had become a practicing attorney in Houston. On 28 April 1993, Vaught and her husband filed this action in Texas state court against Showa Denko K.K. and its American distributors; it was removed to federal court in February 1994. That June, the Panel on Multidistrict Litigation ordered this action

transferred to the United States District Court for the District of South Carolina to be joined with pending nationwide L-tryptophan litigation being conducted there (MDL No. 865). In September 1995, this action was conditionally remanded to district court in Texas for further proceedings.

Defendants then moved for summary judgment on limitations grounds. Following a hearing in January 1996, the district court granted the motion .

II.

The Vaughts present three issues. First, they contend that a genuine issue of material fact exists as to when their cause of action accrued. Next, they seek certification of the following question to the Texas Supreme Court: "Under the Texas

discovery rule, does a plaintiff's diligent, but fruitless, inquiry into whether she has an actionable toxic tort suspend the statute of limitations running against her claim?". Finally, they maintain that Janet Vaught's membership in a putative nationwide L-tryptophan class action tolled the limitations period until class certification was denied.

We review a summary judgment *de novo*, applying the same standard as the district court. *E.g., Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). Such judgment is appropriate where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law". Fed. R. Civ. P. 56(c). In making this determination, we are to draw all reasonable inferences in favor of the nonmovant. *E.g., Bodenheimer*, 5 F.3d at 956. And, because this is a diversity action, we apply Texas substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

App. 8

A.

In Texas, a personal injury action must be filed "not later than two years after the day the cause of action accrues." Tex. (Civ. Prac. & Rem.) Code Ann. 16.003(a). Generally, accrual occurs on the date "the plaintiff first becomes entitled to sue the defendant based upon a legal wrong attributed to the latter", even if the plaintiff is unaware of the injury. *Zidell v. Bird*, 692 S.W.2d 550, 554 (Tex. Ct. App. 1985).

The "discovery rule" is an exception to this general rule. See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). Under Texas' discovery rule, the limitations period is tolled until the plaintiff discovers, *or through the exercise of reasonable diligence should have discovered*, the nature of her injury. See id.; *Willis v. Maverick*, 760 S. W.2d 642, 644 (Tex. 1988).

The term "discovered", however, is quite broad. In *Hoover v. Gregory*, 835 S.W.2d 668 (Tex. Ct. App. 1992, error denied), the Texas Court of Appeals explained: "'Discovery' ... occurs when a plaintiff ha[s] knowledge of such facts as would

cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action." Id. at 671. Such knowledge is "in the law equivalent to knowledge of the cause of action for limitation purposes". *Bayou Bend Towers Council of Co-Owners v. Manhattan Constr. Co.*, 866 S.W.2d 740, 747 (Tex. Ct. App. 1993, error denied).

In other words, a cause of action may accrue before a plaintiff actually learns the "details of the evidence by which to establish his cause of action". *Hoover*, 835 S.W.2d at 672-73 (quoting *Citizens State Bank v. Shapiro*, 575 S.W.2d 375, 385 (Tex. Ct. App. 1978, error refused nre)). As held in the controlling case for purposes of this appeal, *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 754 (Tex. Ct. App. 1995, error denied) this is because the discovery rule "mandates that the plaintiff exercise reasonable diligence to discover facts of negligence or omission".

It is undisputed that Vaught first consumed L-tryptophan from mid-1987 to 1988, more than two years before this action was filed in April 1993. On these facts, the district court

concluded that the limitations period began in 1987, when Vaught first took L-tryptophan, but that it was tolled until April 1990, when the discovery period began. (Defendants do not contest this.) It was then that Vaught read the newspaper article; connected her symptoms with EMS; and contacted the lawyer's office. Therefore, she had two years from that point within which to file suit; she failed to do so.

The Vaughts contend that there is a material fact issue on when the cause of action accrued. They concede that a diagnosis of a disease is not a *sine qua non* to "knowledge" under the discovery rule but claim that Janet Vaught conducted a diligent (albeit fruitless) inquiry into whether Defendants' product was the cause of her symptoms. (Along this line, it bears repeating that Vaught's inquiry apparently ended in mid-July 1990, when she was diagnosed with fibromyalgia. This diagnosis was only approximately three and one-half months after the discovery period began ( when she read the newspaper article). And after the July 1990 diagnosis, she continued to have adverse symptoms, despite taking the prescribed medication for the

diagnosis of fibromyalgia for approximately six months.)

If Janet Vaught exercised reasonable diligence, the Vaughts continue, the legal consequence cannot be dismissal of her action. Therefore, they maintain that the discovery rule should be read to require "knowledge of sufficient facts that actually connect the injury and the tortfeasor so as to warrant the filing of a suit by a reasonable person".

Defendants respond that it is knowledge of the injury -- not knowledge that the injury is actionable -- that triggers the discovery period (and the running of limitations). Thus, once a plaintiff learns that she has been harmed and associates that harm with a potential tortfeasor (such as a product manufacturer), she has two years to discover relevant evidence; difficulty in obtaining a confirming diagnosis during that interval does not toll the two-year period.

In this regard, Defendants contend that the above-referenced decision by the Texas Court of Appeals in 1995 in *Bell v. Showa Denko K.K.* controls. We agree. *Bell* is very similar factually to this action, and squarely addresses the

Vaughts' contention as to when the discovery period began.

Bell also took L-tryptophan and allegedly contracted EMS as a result. *Bell*, 899 S.W.2d at 752. Bell had suffered from severe muscle pains from October 1989 to March 1990. Like Vaught, Bell read about EMS in a newspaper article in late 1989 or early 1990, *id.* at 754, and suspected that she had EMS based on the fact that her symptoms corresponded to those reported by EMS victims (muscle pains and high eosinophil levels in blood). *Id.* at 754-55. Bell consulted with various doctors in July 1990; filled out an "L-tryptophan Eosinophilia-Myalgia Patient Data Sheet"; was told by doctors in March and October 1990 that she might have EMS; but did not receive a positive diagnosis until February 1992. *Id.* at 755. Bell filed suit in Texas state court in September 1992 against Showa Denko, K.K. and others. *Id.* at 752. The trial court granted the defendants summary judgment on limitations grounds. *Id.*

The Texas Court of Appeals affirmed, *id.* at 755, concluding that Bell had " knowledge" of her injury at some point between March and July 1990, when she connected ("associated")

her symptoms with the ingestion of L- tryptophan. *Id.* That knowledge was sufficient to trigger the two-year statute; therefore, Bell's September 1992 filing was too late. *Id.* (As discussed infra, the court also rejected the tolling contention advanced here.)

It is undisputed that, in April 1990, Janet Vaught made a connection between her physical symptoms, EMS, and the ingestion of L-tryptophan. That knowledge was sufficient in *Bell* to trigger the discovery period; it has the same legal effect here.

Vaught's difficulty in obtaining a positive EMS diagnosis does not distinguish this case from *Bell*. As the *Bell* court explained, "the question to be determined is not whether a plaintiff has actual knowledge of the particulars of a cause of action ...; rather, it is whether the plaintiff has knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights." *Id.* at 754 ( emphasis added); see also *Hoover*, 835 S.W.2d at 671-72; *Shapiro*, 575 S.W. 2d at 385. This language presumes that the discovery period begins before a plaintiff has actionable knowledge -- or, as the Vaughts

describe it, knowledge of "sufficient facts that actually connect the injury and the tortfeasor". In sum, there is no exception under Texas law for those who make a diligent inquiry but fail to obtain a positive diagnosis.

We are not blind to the Vaughts' contention that *Bell* places similarly situated plaintiffs in a difficult situation. They assert that, if they had filed suit prior to 1993 -- when they claim they could not produce "a single medical witness to confirm [Janet Vaught's] suspicion that she had EMS" -- they might well have been subject to sanctions under Tex. R. Civ. P. 13 (the counterpart to Fed. R. Civ. P. 11), which forbids making groundless factual and legal allegations. See Tex. R. Civ. P. 13. Yet the consequence of waiting until she obtained a positive diagnosis in 1993 was that her suit was dismissed as time-barred.

The source of the problem is not the Texas discovery rule; it may well be the diagnoses of the first four doctors consulted, all of whom advised Vaught that she did not have EMS. The discovery rule operates to trigger the statute of limitations once a plaintiff has the requisite knowledge, regardless

of whether or how the plaintiff is advised by the medical community. In this regard, the result commanded by Bell is supported by *United States v. Kubrick*, 444 U.S. 111 (1979), in which the Supreme Court considered whether an action under the Federal Tort Claims Act for alleged malpractice in a Veterans Administration hospital had been timely filed:

> If [a plaintiff] fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about [the] injury.

*Id.* at 124.

As a final matter, we note that a statute of limitations can operate to the detriment of both plaintiffs and defendants. In essence, the statute is a compromise; on occasion, it can cause seemingly unfair results. The Texas Supreme Court has explained that the primary purpose of such statutes is"to compel the exercise of a right of action within a reasonable time that the opposing party has a fair opportunity to defend while witnesses

are available and the evidence is fresh in their minds." *Willis*, 760 S.W.2d at 644; see also *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). They establish a "point of repose" and operate to "terminate stale claims". *Murray*, 800 S.W.2d at 828. Nevertheless, Texas' discovery rule, a judicially created exception, theoretically permits an action to be filed long after the limitations period would otherwise have expired, placing defendants like Showa Denko at a possible disadvantage in terms of witnesses and evidence.

On the other hand, Texas has declined to construe the discovery rule to toll limitations periods until "a plaintiff discovers a specific cause of action against a specific defendant". See *Moreno*, 760 S.W.2d at 357 n.9. That approach would "effectively 'expand ... to infinity the time period during which [an action] could be brought'". *Id.* (quoting *Pastierik v. Duquesne Light Co.*, 526 A.2d 323, 325 (Pa. 1987)). Thus, a plaintiff like Vaught, who may be incorrectly advised, may be precluded from pursuing her cause of action, even though she took the necessary investigatory steps mandated by the discovery rule.

B.

The Vaughts ask us to certify to the Texas Supreme Court the question addressed above: "Under the Texas discovery rule, does a plaintiff's diligent, but fruitless inquiry into whether she has an actionable toxic tort suspend the statute of limitations running against her claim?" Certification to the Texas Supreme Court is appropriate only if "it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas". Tex. R. App. P. 114(a); see Tex. Const. art. V, 3-c; see also *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir.1992).

This procedure is not "a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state." *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992). Thus, even in the absence of decisions by the Texas Supreme Court or intermediate appellate courts on an issue of state law, we will not necessarily certify a question. See, e.g., *Swearingen*, 968 F.2d at 564.

Existing Texas law (especially Bell) adequately addresses the discovery rule issue. Accordingly, we decline the certification request.

C.

The Vaughts' final contention is that Janet Vaught's potential membership in a putative L-tryptophan federal class action tolled the limitations period until class certification was denied. On or before 27 September 1990, three nationwide class actions were filed in Maryland against various defendants, including Showa Denko, on behalf of "natural persons who sustained personal injuries as a result of ingesting ... L-tryptophan ". Two of the actions were filed in federal court; one filed in state court was removed to federal court. *Rapoport v. P. Leiner Nutritional Products Corp.* (JH-90-397) (D. Md. -- filed in state court 20 Dec. 1989 and removed to federal court 2 Feb. 1990); *Rapoport v. Showa Denko America* ( JH-90-518) (D. Md. -- filed 13 Feb. 1990); *Rapoport v. Showa Denko K.K.* ( JH-90-2516) (D. Md. -- filed 27 Sept. 1990). All three were transferred by the Panel on Multidistrict Litigation to the

earlier-referenced litigation in South Carolina (MDL No. 865). Certification was denied in two of the actions in January 1992; the third action was dismissed in May 1992 without reaching the certification issue.

The Vaughts contend that, under the decisions of the Supreme Court in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), and of the Texas Court of Appeals in *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366 (Tex.Ct. App. 1987), Janet Vaught's membership in the putative *Rapoport* classes tolled the limitations from running against her claim (putative class action tolling ). Thus, even assuming the limitations period began running on 4 April 1990, when she read the newspaper article, the period would have been tolled, at the latest, on 27 September 1990 (176 days later), when the last *Rapoport* action was filed; and when class certification was denied on 3 January 1992, the limitations period would have resumed. Therefore, the Vaughts would have had until 11 July 1993 (two years less 176 days equals 554 days) to file suit, making their April 1993 filing

timely.[3]

In *American Pipe* and *Crown, Cork & Seal*, the Court held that filing a Fed. R. Civ. P. 23 class action tolled limitations

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[3]In ruling against this contention, the district court stated initially that Janet Vaught had opted-out of the putative *Rapoport* classes by independently pursuing her claim. In response to the Vaughts' counsel urging that she had not opted-out -- because she had not filed suit until after denial of class certification -- the district court stated:

> There's nothing in the facts here that suggest that she did not pursue her claim because of the pendency of that action. She consulted counsel and doctors and thought she didn't have a claim. Unilateral mistake of fact.

We agree with the district court that the record does not reflect that Vaught withheld filing suit pending a class certification ruling. Moreover, Vaught does not claim that she did. (In any event, any thought that Vaught withheld filing pending certification is belied by the fact that this action was not filed until April 1993, approximately 16 months after denial of certification in South Carolina.)

Accordingly, a possible issue might be whether Janet Vaught's independent actions (possibly including contacting the law firm and consulting with doctors) and otherwise not awaiting a class certification ruling preclude her from receiving shelter under the putative class action tolling rule advanced here. It appears that the district court ruled that they do. On the other hand, for our *de novo* review, neither side presses the issue. In any event, because, as discussed infra, we conclude that the Vaughts' class action tolling contention fails, we need not consider this possible issue.

for potential class members pending the certification ruling. *Crown, Cork & Seal*, 462 U.S. at 353-54; *American Pipe*, 414 U.S. at 552-53. And, in *Grant*, after the Texas Court of Appeals determined that Tex. R. Civ. P. 42 was patterned after Federal Rule 23, the court relied on *American Pipe* and *Crown, Cork & Seal* in holding that a state class action tolled the limitations period for all potential class members. *Grant*, 725 S.W.2d at 370.

Defendants counter that the *American Pipe* tolling rule governs only property damage-type claims, not mass personal injury claims, for which class certification has historically been disfavored. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 746-47 (5th Cir. 1996) (denying nationwide class certification for proposed class of nicotine-dependent persons who smoked and purchased cigarettes manufactured by tobacco companies and of their families). They assert that the *American Pipe* holding was based on the premise that a class action would provide a defendant with sufficient notice of the "potential claims of all potential class members".

In any event, Defendants assert primarily that the Texas

Court of Appeals' decision in *Bell* also controls this issue because *Bell* held that, under *American Pipe*, class action does not toll state personal injury claims. The Vaughts maintain, inter alia, that the tolling language in *Bell* is *dicta*, because *Bell* also held that the class action tolling issue had not been preserved for appeal. Id. at 756-57. However, under Texas law, "[w]hen [the] highest court gives two grounds for a decision, both of which are carefully developed and supported by authority, an intermediate court cannot justifiably disregard either of these grounds as obiter." *Inn of Hills, Ltd. v. Schulgen & Kaiser*, 723 S.W.2d 299, 301 (Tex. Ct. App. 1987, error refused nre)(quoting *Reynolds-Penland Co. v. Hexter & Lobello*, 567 S.W.2d 237, 243 (Tex. Civ. App. 1978) (Guittard, J., dissenting)). Although the foregoing authority refers to alternative holdings by the Texas Supreme Court, this alternative-holdings rule must, of necessity, apply to decisions by Texas' intermediate appellate courts as well. In *Bell*, the procedural and substantive bases for the tolling rulings are independently developed and supported and do not depend on hypothetical facts; neither can be disregarded as dicta.

We conclude that, pursuant to *Bell*, the *Rapoport* actions did not toll the limitations period for the Vaughts. We arrive at this conclusion, however, in a somewhat circuitous manner. As before, we begin with *Bell*.

*Bell* contended that, under *Grant* and the *American Pipe* line of cases, a federal class action filed in New Mexico tolled limitations on her claim until class certification was denied. *Bell*, 899 S.W.2d at 756-57. In addressing this issue on the merits, the *Bell* court concluded first that the *American Pipe* line of cases did not directly control, because they involved the tolling effect of putative federal class actions on federal statutes of limitations. *Id.* at 757. Whether a state statute of limitations would be tolled by a federal class action, the court explained, was a question of state law. The *Bell* court construed *Grant* to apply only to the tolling effect of a state class action on state claims. *Id.* at 757- 58. In addition, the *Bell* court concluded, the *American Pipe* tolling rule was meant to apply only where a class action gives a defendant notice of the "type and potential number of the claims against it" -- for example, where a "discernible group of people claim[ ]

injury to certain property". *Id.* at 758. The court explained:

> For us to hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in *American Pipe*, would be an extension not warranted by [*Grant*] and we refuse to do so.

*Id.* Hence, the federal class action involved (New Mexico) did not toll the limitations period on Bell's state claims pending a certification ruling.

To circumvent this holding in *Bell*, the Vaughts cite Supreme Court and Fifth Circuit precedent, see *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *F.D.I.C. v. Dawson*, 4 F.3d 1303 (5th Cir. 1993), cert. denied, 114 S. Ct.2673 (1994), contending that a federal court may disregard a state tolling rule if it is inconsistent with a federal policy -- in this case, the tolling effect of a putative federal class action. Federal Rule 23 seeks to avoid a multiplicity of actions in various courts and the "filing of repetitious papers and motions". *American Pipe*, 414 U.S. at 550. Therefore, the Vaughts assert that, if the limitations period is not

tolled during the pendency of a Rule 23 class certification ruling, potential class members will have to adopt a "belt-and-suspenders attitude": each will have to file suit individually to preserve her claim in the event that certification is later denied.

None of the cited cases, however, support this contention. *Johnson* and *Tomanio* involved federal causes of action under 42 U.S.C. 1981 and 1983. *Tomanio*, 446 U.S. at 482; *Johnson*, 421 U.S. at 456. Because federal law does not specifically provide the limitations period, state law is "borrowed" to provide it. *Johnson*, 421 U.S. at 462. In fact, *Johnson* and *Tomanio* hold that, in addition to borrowing a state's statute of limitations fora 1981 or 1983 action, a federal court should also borrow the corresponding tolling rules for such actions. *Tomanio*, 446 U.S. at 485-86; *Johnson*, 421 U.S. at 463-64. Of course, any borrowed state law cannot be "inconsistent with the constitution and laws of the United States". 42 U.S.C. 1988(a); see *Tomanio*, 446 U.S. at 485-86; *Johnson*, 421 U.S. at 465.

*Dawson* involved a federal claim under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

(FIRREA) brought by the FDIC as receiver. *Dawson*, 4 F.3d at 1305-07. Although FIRREA provides a limitations period for such claims, it cannot revive stale state law claims; thus, a court must determine whether a claim would be barred by a state statute of limitations. *Id.* at 1306-07. In *Dawson*, that inquiry included determining whether the doctrine of adverse domination tolled the state limitations period and whether, for that question, federal or state law controlled. *Id.* at 1308. Citing *Johnson*, our court held that, because we were "borrowing" a state statute of limitations, state tolling principles would be the "'primary guide'", id. at 1308-09 (quoting *Johnson*, 421 U.S. at 465), and could be disregarded only if "inconsistent with federal policy". *Id.* (citing *Tomanio*, 446 U.S. at 485-86).

Needless to say, these cases are inapposite to this case; they deal with borrowing state law to fill gaps left by Congress for federal causes of action. In a 1981, 1983, or FIRREA action, federal law still supplies the rules of decision. It makes sense, therefore, that under 42 U.S.C. 1988 and the *Johnson* and *Tomanio* cases, a federal court may disregard a state tolling rule

on certain occasions.

By contrast, diversity actions, such as the one at hand for product liability, involve state causes of action, where state law, of course, provides the rules of decision, even in federal court. In fact, the Supreme Court has stated that generally, for diversity actions, a federal court should apply not only state statutes of limitation but also any accompanying tolling rules. *Walker v. Armco Steel Co.*, 446 U.S. 740, 750- 53 (1980) (rendered only two weeks after *Tomanio*).

The case providing the strongest support for the Vaughts appears to be *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). At issue was whether, in a diversity action, the judge or the jury decided, under a state workers' compensation act, the question of employer immunity. *Id.* at 533-34. The applicable state rule, pursuant to case law, provided that the judge decided the question, *id.*; however, in federal court civil actions, the jury traditionally, of course, resolved disputed questions of fact. *Id.* at 534. Therefore, the Supreme Court held that the federal court should not follow the state rule. *Id.* at 538-40.

The Court first explained that the state rule was not "an integral part of the special relationship created by the [workers' compensation] statute", but was "merely a form and mode of enforcing the immunity ... and not a rule intended to be bound up with the definition of the rights and obligations of the parties". *Id.* at 536. In addition, the federal policy of having juries decide disputed questions of fact was an "essential characteristic" of the federal system, strongly influenced by the Seventh Amendment. *Id.* at 537-38. For the Court, the importance of this federal policy outweighed the state rule.

The Supreme Court's subsequent decision in *Hanna v. Plumer*, 380 U.S. 460 ( 1965) (holding that federal court sitting in diversity should apply Fed.R. Civ. P. 4, rather than conflicting state rule, because federal rule was consistent with Rules Enabling Act), does not prevent us from applying *Byrd* to the facts at hand.

*Hanna* concerned a federal rule of civil procedure promulgated pursuant to the Rules Enabling Act, 28 U.S.C. 2072, that was in "direct collision" with state law. *Hanna*, 380 U.S. at

461-64. In the case at hand, however, there is no federal rule of civil procedure that is in direct conflict with state law. Although the *American Pipe* tolling rule is intended to preserve the policies underlying Rule 23, neither Rule 23 nor any other rule expressly mandates tolling limitations periods. See Fed. R. Civ. P. 23. Restated, we are not "narrowly construing" the federal rules to avoid a "direct collision" with state law; rather, we are applying the rules' plain meaning. See *Walker*, 446 U.S. at 750 n.9. And, in those cases where "there is no conflict between the Federal Rule and ... state law", *Hanna* does not apply. Id. at 752.

Tolling is essentially a judge-made practice, see *Crown, Cork & Seal*, 462 U.S. at 350-54; *American Pipe*, 414 U.S. at 552-59, and nothing in Hanna detracts from a *Byrd*-type analysis of a conflict between a judge-made federal practice and a state rule. Neither *Hanna* nor any other Supreme Court case has explicitly overruled *Byrd* or suggested that it no longer retains vitality. (*Walker*, in which the Supreme Court applied a state tolling rule in a diversity case, involved a claimed conflict with Fed. R. Civ. P. 3, not a federal practice, as here. See *Walker*, 446

U.S. at 741- 43.)

In addition, to the extent our court has previously questioned the vitality of Byrd in the light of *Hanna*, it has done so by suggesting that *Hanna* expanded the power of federal courts to disregard state law in diversity cases:

> We think, in the light of later authority, that *Byrd* gave too little recognition to the federal forum-qua-forum interests.... *Hanna* gives us good reason to hold that federal courts have inherent powers under Article III to displace state laws on matters involving their basic competence as courts.

See *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F. 2d 1147, 1159 (5th Cir. 1987), *cert. granted and judgment vacated on other grounds, Pan American World Airways v. Lopez*, 490 U.S. 1032 (1989), on remand, 883 F.2d 17 (5th Cir. 1989).

And, the Tenth Circuit has stated that, under *Byrd*, a federal court sitting in diversity may disregard a state tolling rule. *Cook v. G.D. Searle & Co.*,759 F.2d 800, 803 (10th Cir. 1985) ("A state tolling rule ... will generally govern in diversity actions absent a direct conflict between a state rule and an overriding

federal rule or affirmative countervailing federal consideration".) (citing *Byrd*). Under *Byrd*, therefore, the Texas non-tolling rule (stated in *Bell*) could arguably be displaced because it conflicts with the well-established federal tolling practice promulgated in *American Pipe* and *Crown, Cork & Seal*.

Without doubt, there is a strong federal policy favoring the tolling of limitations periods as to all potential members of a Rule 23 class action. The Supreme Court explained in *American Pipe* that a contrary holding would

> frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties -- precisely the multiplicity of activity which Rule 23 was designed to avoid....

*American Pipe*, 414 U.S. at 551.

In *Crown, Cork & Seal*, the Court explained that the *American Pipe* rule applied to all potential class members, not just intervenors. *Crown, Cork &Seal*, 462 U.S. at 353-54. It went on to state that, without tolling, its holding in *Eisen v. Carlisle &*

*Jacquelin*, 417 U.S. 156 (1974), requiring individual notice to absent class members, would make no sense. *Crown, Cork & Seal*, 462 U.S. at 351. Notice is intended to enable class members to opt-out and pursue their claims independently. *Id.* If there were no tolling rule, notice would be irrelevant, because the limitations period for absent class members would most likely have expired, making the right to pursue a claim separately utterly meaningless. *Id.* at 351-52.

In the light of *Bell*, we understand Texas' tolling rule to operate as follows: A state (Texas) class action that raises property damage-type claims tolls a Texas statute of limitations pending a certification ruling . And, consistent with our understanding of this Texas tolling rule, it is unclear whether, under this rule, a federal class action filed in Texas or in any other State would ever toll a Texas statute of limitations, regardless of the type of claims raised.[4]

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[4] Pre-*Bell*, our court noted that Texas' tolling rule was the same as the federal rule under *American Pipe* and *Crown, Cork & Seal*. See *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 715 n.25 (5th Cir. 1994) (citing *Grant*). Post-*Bell*, that observation retains little vitality.

In any event, this Texas rule clearly conflicts with the well-established federal practice on class action tolling. We conclude, however, that, for this case, the federal interest in that practice does not trump the Texas tolling rule. Unlike the situation in *Byrd* or *Hanna*, neither the federal constitution or federal law would be displaced. On the other hand, a tolling rule is an "integral part" of a statute of limitations. See *Byrd*, 356 U.S. at 536. Therefore, Texas' interest in its tolling rule has quite considerable depth. This is because its rule is a means of enforcing its statute of limitations, a matter of considerable importance to Texas, one reflecting a deliberate policy choice by its legislature.

In short, we have come full-circle. *Bell* controls. Consequently, summary judgment was proper.

III.

Because the Vaughts' action is time-barred, the summary judgment awarded Defendants is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-20200

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JANET L VAUGHT; ROBERT ALAN VAUGHT;
MITCHELL LAUREN VAUGHT
Plaintiffs - Appellants

v.

SHOWA DENKO K K; SHOWA DENKO AMERICA, Inc;
LEINER HEALTH PRODUCTS INC;
PHARMAVITE CORPORATION;
GENERAL NUTRITION INCORPORATED;
GENERAL NUTRITION CORPORATION;
GENERAL NUTRITION PRODUCTS, INC;
NATURE'S PRODUCTS, INC; WALGREEN
COMPANY; ECKERD HOLDINGS II INC,
doing business as Eckerd Drugs
Defendants - Appellees

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Appeals from the United States District Court for the
Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 3/10/97, 5 Cir., ____F. 3d_____)

Before HIGGINBOTHAM, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this

panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

(x ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

\s\ Rheesa Barksdale
United States Circuit Judge

## F.R.C.P. 23. Class Actions

**(a) Prerequisites to a Class Action.**

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Class Actions Maintainable.**

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical

matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under

subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.**

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or

otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Dismissal or Compromise.**

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MARGARET KENNEDY,
Plaintiff

CV 94-312 M

vs.

SHOWA DENKO K.K., a Japanese entity who may be incorporated and authorized to do business in the USA, SHOWA DENKO AMERICA, INC., a New York corporation, JAMESON NUTRITIONAL DIVISION, JAMESON PHARMACEUTICAL CORP., a California corporation and DOE COMPANIES No. 1 through 50, inclusive,
Defendants

MEMORANDUM OPINION
AND
ORDER

This matter comes on for consideration on defendant's motion for summary judgment on statute of limitations (17-1], defendant's motion for leave to file brief in excess of twelve (12) pages in reply to memorandum in oppsition to motion for summary judgment [25-1], plaintiff's motion to strike defendant's improper submission of Bell-v-Showa Denko K.K. or, in

the alternative, to rebut the arguments presented therein (37-1, 37-2, and plaintiff's motion to supplement response to motion for summary judgment on statute of limitations by adding exhibit which has recently been received from MDL [28-1}.

Having considered the motions, responses and replies, and being otherwise fully advised in the premised, I find defendant's motion for summary judgment is not well-taken and is hereby denied; defendant's motion for leave to file brief in excess of 12 pages is moot; plaintiff's motion to strike or rebut arguments is well-taken and is hereby granted as to plaintiff's alternative; and plaintiff's motion to supplement response to motion for summary judgment is well-taken and is hereby granted.

BACKGROUND

Plaintiff Kennedy sues for damages for injuries she attributes to her ingestion of a dietary supplement containing L-tryptophan. Plaintiff brings counts of negligence, strict liability, breach of warranty and fraudulent misrepresentation against defendant for her developing a medical condition known as "eosinophilia myalgia syndrome" (EMS). EMS sufferers display

symptoms of eosinophilia (elevation of a type of white blood cell), disabling myalgias and other physical symptoms, including shortness of breath, chronic fatigue, hair loss, and flu-like symptoms.

Kennedy took the dietary supplement from January 1988 to late summer or early fall in 1989 to help her sleep at night. She started experiencing symptoms of what she now attributes to EMS in July 1989. Kennedy discontinued taking L-tryptophan in late 1989, when she read an article about problems associated with L-tryptophan in the Albuquerque Journal. **See Kennedy Dep., Mem. of Law in Supp. of Deft.'s Mot. For Sum. J. [hereinafter, "Deft.'s Mem."], Ex. 2, p. 146.** Sometime in late 1989, after reading the article, she contacted a physician concerning her use of the supplement. **See Deft.'s Mem., Kennedy Dep., p. 68.** She was also contacted by her attorney, Nancy Garner, who knew Ms. Kennedy was prescribed L-tryptophan for her insomnia. Ms. Kennedy supplied Ms. Garner with the remaining L-tryptophan pills sometime before May 1990. **See Kennedy Dep., p. 134.**

Defendant asserts that plaintiff's claims are time-barred

by New Mexico's three-year statute of limitations governing personal injury claims. **N.M.S.A. § 37-1-8 (1990 Repl. Pamp.)**. Parties correctly do not dispute that this three-year limitations period applies to all counts in her claim. **Hartford v. Gibbon. & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980) (New Mexico takes the view that "it is the nature of the rights sued upon, not the form of the action or relief demanded which determines the applicability of the statute of limitations.").**

Kennedy contends that the federal equitable tolling doctrine presented in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) applies to her case, suspending the three-year limitations period for her claim. She further contends that, applying the discovery rule to the facts of her case, she is well within the applicable limitations period. Although Kennedy admits that she started to experience symptoms in July 1989, she claims that she was not aware that L-tryptophan was the cause of her problems until some time later. **Roberts v. Southwest com. Health Serv., 114 N.M. 248 (1992) (applying the discovery rule to medical malpractice claims, a cause of action accrues when the plaintiff discovers or with reasonable diligence**

**should have discovered that a claim exists); cf. Sawtell v. E.I. DuDont de Nemours & Co., 22 F.3d 248, 250 (10th Cir. 1994), cert. den, ____ U.S.____, 115 S.Ct 295 (1994) (presuming that New Mexico would eventually apply the discovery rule in products liability cases, but finding it unnecessary to address issue for case at bar); also, cf. Zamora v. Prematic Sery. Corp., 936 F.2d 1121, 1123 (l0th Cir. 1991 (for purposes of the statutes of limitations, general rule is that a cause of action generally accrues from the injury rather than from the wrongful act).**

Defendant also argues that the tolling doctrine in American Pipe does not apply to a state claim heard in federal court sitting in diversity. Further, defendant asserts that plaintiff's claim fails even following a discovery rule to ascertain when plaintiff's claim accrued. In light of the undisputed facts, defendant maintains that plaintiff knew or should have known through the exercise of reasonable diligence that L-tryptophan potentially had a causal relationship to her alleged injuries, in light of the undisputed facts.

DISCUSSION

I. Plaintiff's Motions

Plaintiff motions to strike defendant's improper submission of Bell v Showa Denko K.K. or, in the alternative, to rebut defendant's arguments presented therein. Plaintiff maintains that defendant should have submitted this additional authority in the form of a motion.

Defendant has submitted Bell to support its premise that the American Pipe tolling doctrine does not apply to the instant case. Counsel has an obligation to apprise the court of the most recent authorities on any pending issues. See New Mexico Rules of Professional Conduct, Rule 16-303(A)(3) (Repl. Pamp. 1991). As I will consider defendant's submission of Bell v Showa Denko in determining the merits of defendant's summary judgment motion, I therefore grant plaintiff's request to submit rebuttal arguments. My granting plaintiff's motion in the alternative renders moot that portion of the motion concerning whether defendant complied with the technical requirements of the Federal Rules of Civil Procedure in submitting the additional caselaw.

Plaintiff also makes a request to supplement the response to defendant's motion for summary judgment. The supplement consists of certified copies of documents which had not been available from the court clerk at the time plaintiff filed its response. Reference to these documents was made in plaintiff's response, thereby providing adequate notice of their existence to the defendant. **Pltf.'s Resp. to Deft's Mot. for Sum. J., p. 3.** Therefore, this request is well-taken and is hereby granted.

II. Defendant's Motion for Leave to File Brief in Excess of Twelve (12) Pages in Reply to Memorandum in Opposition to Motion for Summary Judgment

Defendant alleges that it cannot adequately reply to new issues raised in plaintiff's response to defendant's summary judgment motion within the existing page limit. Plaintiff objects on the grounds that the excess page limit violates D.N.M.L.R.-CV7.6 and that defendant refuses to concur in plaintiff's motion to file a surreply. On June 14, 1995, I entered an Order granting plaintiff leave to file a surreply [43-1]. That Order dispenses with any remaining objection by plaintiff, thereby rendering defendant's motion moot.

III. Defendant's Motion for Summary Judgment

Defendant Showa Denko asserts that plaintiff's claim is time-barred because the limitations period was not tolled during the pendency of the class action suit. In addition, if the limitations period was not tolled, the discovery rule does not aid plaintiff because she knew or should have known through the exercise of reasonable diligence that L-tryptophan potentially had a causal relationship to her alleged injuries. However, I need not determine if there is a genuine dispute of material fact as to whether application of the discovery rule keeps plaintiff's claim alive, or whether the discovery rule should be employed at all, as I find that the American Pipe doctrine applies to Kennedy's case, thus keeping plaintiff well within the three-year statutory period.

A. Standard of Review

A summary judgment is proper when, upon examining the record and its reasonable inferences in the light most favorable to the nonmoving party, the court determines there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. **Moya v. United States**, 35

F.3d 501, 503 (10th Cir. 1994); Fed. R. Civ. P 56(c). The party moving for summary judgment bears the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Moya 35 P.3d, 501, 503 (10th Cir. 1994). Once the moving party carries this burden, the nonmoving party must go beyond the pleadings to "set forth specific facts showing that there is a genuine issue for trial" sufficient to support a verdict for the nonmovant. Anderson V. Liberty Lobby Inc., 477 U.S. 242, 248-49 (1986).

Whether a factual issue is "material" for summary judgment purposes is determined by the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1956). However, because I find that Anderson Pipe's class action tolling doctrine is the applicable substantive law, I need not reach the issue of whether there is a genuine issue of fact. Applying the doctrine to facts where plaintiff's action accrued at the earliest possible time, July 1989, plaintiff still remains within the required statutory period. I now examine whether the federal equitable tolling doctrine set out in American Pipe & Construc-

tion Co. v. Utah, 414 U.S. 538 (1974) controls the facts of this case.

B. Determining the Applicable Substantive Law

On February 13, 1990, Lola J. Rapoport, on behalf of herself and all others similarly situated, filed suit against Showa Denko America in the United States District Court for the District of South Carolina claiming injury from the ingestion of L-tryptophan. Kennedy claims to be, nor is it disputed that she is, a putative member of this suit. Plaintiff contends that the filing of this class action complaint tolled the statute of limitations with respect to the time the class action was filed, February 13, 1990, to January 3, 1992, the date when the Rapoport court denied class certification. See Pltf.'s Resp., Ex. 4. A suspension of the three-year limitations period would thus afford Kennedy, who filed the complaint on January 20, 1994, approximately 29 months remaining following the denial of class certification. Plaintiff bases entitlement of the suspension on the United States Supreme Court's holding in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

Defendant maintains that the tolling doctrine in American

Pipe applies only to federal claims, not to state claims heard in federal court solely on diversity grounds. Defendant further maintains that courts have rejected the doctrine's use with class actions for personal injury.

The American Pipe Doctrine

The United States Supreme Court in American Pipe & Construction embraced the principle that the filing of a class action tolls the applicable statute of limitations for all class members, whether or not the class member ultimately opts out of the class. Id.; see Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (extending American Pipe's tolling principle to all asserted members of the plaintiff class, not only to intervenors). In American Pipe's class action alleging federal antitrust violations was filed eleven days before the statute of limitations period governing antitrust suits had elapsed. The District Court denied class certification because the numerosity requirement had not been satisfied. The Supreme Court held that commencement of the "original class suit tolls the running of the statute for all purported members of the class who make timely

motion to intervene after the court has found the suit inappropriate for class action status." Id. at 553.

The intent of the American Pipe rule is to preserve the individual right to sue of the members of a proposed class until the issue of class certification has been decided. Crown, Cork & Seal Co., 462 at 354. The doctrine is consistent with promoting judicial efficiency and economy, and with Fed.R.Civ.P. 23 in avoiding multiplicity of suits. American Pipe, 414 U.S. at 551.

Applying American Pipe to Plaintiff's case

A federal court sitting in diversity must apply the law of the state in which it sits. Resolution Trust, 840 P.Supp. 1463, 1479 (D.N.M. 1993) (citing Erie v. Tomkins, 304 U.S. 64 (1938)). New Mexico has a statute which allows a three-year limitations period in which to bring personal injury actions. A state law barring an action because of a statute of limitations is sufficiently "substantive" enough in the Erie sense, so that a federal court exercising diversity jurisdiction must respect it. Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir. 1977), cited in Federal Deposit Ins. Corp. v. Petersen, 770 F.2d 141, 142 (10th Cir. 1985). N.M.S.A. § 37-1-8 (1990 Repl. Pamp.). A

federal court must accord similar deference to rules governing tolling periods. **Wright & Miller, § 1056, at 179-80 ("In diversity cases. . . . state law governs the tolling of the statute of limitations under [Erie].").**

New Mexico law, however, does not offer any guide on the issue of tolling for purported class members during the pendency of a class action. In fact, as plaintiff points out, New Mexico has traditionally looked to the Federal Rules to fill in the gaps for law relating to class action suits. See **Pltf.'s Resp., p. 8; see also Paul Biderman, The Impact of the Revised New Mexico Class Action Rules Upon Consumers, 9 N.M.L. Rev. 272 (1979); May v. AC& S, Inc., et al, 812 F.Supp. 934, 938 (E.D. Mo. 1993) (adopting federal tolling principles under Missouri law).** However, New Mexico's general tolling statute closely resembles the American Pipe tolling doctrine in design and purpose:

> When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation.

**N.M.S.A. § 37-1-12 (Repl. Pamp. 1990).** The New

Mexico statute speaks to those proceedings where a stay is actually issued, but can be said to comport with the objectives in the American Pipe tolling doctrine.

The Tenth Circuit has laid the groundwork for resolving the question of whether American Pipe should be used in cases involving state claims heard in federal court on diversity grounds. **Sawtell v. E.I. DuPont De Nemours Co., Inc. 22 F.3d 248 (10th Cir. 1994).** The Tenth Circuit, while acknowledging that the issue is "currently disputed among the circuits," nevertheless refrained from deciding the issue because Mrs. Sawtell was not a putative member of the class action, which was intended to include only Minnesota residents. Interestingly, the tolling doctrine was actually applied in a Tenth Circuit case decided only one month after the Sawtell case. **See Ballen v. Prudential Bache Securities, Inc. 23 F.3d 335, 337 (10th Cir. 1994) (under equitable tolling doctrine, the statutes of limitations are tolled for putative members of class action for racketeering and fraud).**

Some district courts in the Tenth Circuit have been applying the tolling doctrine to particular areas of law. See

Sinclair Oil Corp. v. Atlantic Richfield, 720 F.Supp. 894, 912 (D.Ut. 1989) (oil company sued for violations of Economic Stability Act); Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) (extending equitable tolling rule to securities laws in general). However, the majority of cases in jurisdictions which have extended the doctrine involve non-personal injury class actions. Cmp. Hyatt Corp. v. Occidental Fire & Casualty Co., 801 S.W.2d 382 (Mo. 1990) (rescuer claims involving personal injury settlements against insurer).

Defendant, relying on a California Supreme Court case, asserts that because class action suits involving personal injury can "rarely" meet the commonality requirement of a class action suit, the tolling doctrine should not be applied to plaintiff's case. See Jolly v. Eli Lilly & Co., 751 P.2d 923 (Cal. 1988). Defendant construes American Pipe narrowly to mean that the doctrine should apply only to those types of class actions where denial of certification is based on lack of numerosity. Jolly suggest that the potential lack of commonality in mass tort personal injury claims can rob defendants of notice of "substantive claims being brought against them." Id.; see also Bell v.

Showa Denko K.K., et al., No. 07-94-0138 CV, at 16 (Ct.App.Tx., 7th Dist., May 17, 1995).

Notwithstanding the distaste for mass tort litigation demonstrated by the California Supreme Court, a California Appeals court several years later reaffirmed the general rule of American Pipe as applied to tort claims. Becker V McMillan Construction Co., 277 Cal.Rptr. 491, 496 (Ct.App.4th Dist. 1991). Becker construed Jolly narrowly, finding that the "presumption suggested" by Jolly was "not a conclusive one." Id. (finding that Jolly left open the possibility of applying tolling doctrine "even in mass tort cases in which a lack of commonality had been found"). Also, in light of recent mass tort litigation, the cautious holding in Jolly seems unfounded. See Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Master File No. CV 92-P-10000-S (N.D.Al. 1994).

There is no indication from the holding in American Pipe that the equitable tolling doctrine should be limited to federal statutes of limitation. Nor is there any indication that it should apply only to class actions which have been denied certification solely because they do not satisfy the numerosity requirement.

The language in American Pipe refers to this type of case as the minimum threshold, at which point the doctrine should be applied. **American Pipe, 414 U.S. at 552-52 ("We hold that . . . at least where class action has been denied solely because of the failure to demonstrate [numerosity]," the original class suit will toll the running of the limitations period) (emphasis supplied).**

I therefore find that the American Pipe doctrine tolled plaintiff's claims from February 13, 1990 when the class action suit was filed, to January 3, 1992 when the MDL court denied class certification.

Tolling Effect

Defendant asserts that even if the limitations period in plaintiff's suit was tolled, New Mexico law determines the length of time remaining to plaintiff after class certification was denied. According to defendant, plaintiff had only six months after denial of certification on January 3, 1992 in which to file her complaint. Under this assessment, plaintiff's time period ran -out before she filed her suit on January 20, 1994. However, I find that the New Mexico statute relied on by

defendant does not apply in the present case.

The purpose of the state savings statute, N.M.S.A. § 37-1-14 (Repl. Pamp. 1990), is to save a suit from a lapsed limitations period when an earlier suit was dismissed for reasons other than on its merits or from failure to prosecute. See Benally V. Pigman, 78-N.M. 189 (1967). Thus, the purpose of the statute is not to "stop or toll the running of the statute but [to preserve or save) to the plaintiff [additional time in which) to file a second action if the statute of limitations has run." Waltrip v. Sidwell Corp., 234 Kan. 1059, 1064 (1984) (interpreting the Kansas savings statute). Using the savings statute as a basis to shorten plaintiff's time in which to file her suit when she still had almost three years remaining is illogical and incongruous with the purpose of the savings statute.

It seems clear enough from the language set out in American Pipe that plaintiff had approximately 29 months remaining in the limitations period following denial of class certification. American Pipe, 414 U.S. at 554 ("commencement of class action suspends the applicable statute of limitations as to all asserted members of the class.") (empha-

sis supplied). Such a finding is consistent with the general New Mexico tolling statute, N.M.S.A. § 37-1-12 (see discussion, supra); see also Sinclair Oil Corp. v. Atlantic Richfield, 720 P.Supp at 912 (class action tolling doctrine preserves for individual class members portion of limitations period that remained at time class action was instituted).

Because of the foregoing reasons, I find that the class action tolling doctrine in American Pipe applies to plaintiff's case and that plaintiff's limitations period was suspended during that time the class certification action was pending. Accepting that the cause of action accrued at the earliest possible date in July 1989, plaintiff was well within the required three-year statutory period when she filed her complaint. Because the American Pipe tolling doctrine is the applicable substantive law in the case, the undisputed facts warrant a denial of defendant's summary judgment motion. Now, therefore it

IT IS ORDERED that defendant's motion for summary judgment is hereby denied;

IT IS FURTHER ORDERED that defendant's motion for leave to file brief in excess of 12 pages is moot;

IT IS FURTHER ORDERED that plaintiff's motion to strike or rebut arguments is hereby granted as to plaintiff's alternative;

IT IS FURTHER ORDERED that plaintiff's motion to supplement response to motion for summary judgment is well-taken and is hereby granted.

SENIOR UNITED STATES
DISTRICT JUDGE

[FILED JULY 26, 1995]

**Tex. (Civ. Prac. & Rem.) Code Ann. §16.003**

§ 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

No. 96-1951

(2)

Supreme Court, U.S.
FILED
JUL 9 1997
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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JANET L. VAUGHT, ALAN VAUGHT,
and MITCHELL VAUGHT,
*Petitioners,*

v.

SHOWA DENKO, K.K.; SHOWA DENKO AMERICA, INC.;
LEINER HEALTH PRODUCTS, INC.; PHARMATIVE CORP.;
GENERAL NUTRITION, INC.; GENERAL NUTRITION CORP.;
GENERAL NUTRITION PRODS., INC.;
WALGREEN CO.; and ECKERD HOLDINGS II, INC.,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## RESPONDENTS SHOWA DENKO, K.K. AND SHOWA DENKO AMERICA, INC.'S BRIEF IN OPPOSITION

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SARA D. SCHOTLAND
*Counsel of Record*
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

ROWLAND FOSTER
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

*Attorneys for Respondents*
*Showa Denko K.K. and Showa Denko America, Inc.*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

## QUESTION PRESENTED

Whether the court of appeals correctly applied state law to hold that the statute of limitations applicable to a personal injury claim was not tolled by the filing of a nationwide class action in federal court.

## RULE 29.6 STATEMENT

Respondent Showa Denko K.K. has no parent corporation and directly or indirectly controls the following non-wholly owned subsidiaries: Fuyo Perlight K.K., Hitool (S) Pte Ltd., Hokkaido Industrial Gases Co., Ltd., Hymold (Pte) Ltd., Hymold (Thailand) Ltd., Japan Polyolefins Co., Ltd., Japan Polypropylene Co., Ltd., K.K. Toyama Air Supply, Kosai Auto Gas K.K., Kyodo Light Metal Trading Co., Ltd., Nagoya Kenmazai Kogyo K.K., Niigata Showa, Pacific Hydrogen Co., Ltd., P.T. Hymold (Indonesia), SD Gas Sales Kabushiki Kaisha, Shotic Corporation, Shotic (Singapore) Pte Ltd., Shotic America Corporation, Showa Aluminum Corp., Showa Aluminum Corporation of America, Showa Aluminum Powder K.K., Showa Denko Air Products Co., Ltd., Showa Denko Carbon, Inc., Showa Distribution K.K., Showa Engineering Co., Ltd., Showa Financing K.K., Shunan Denko K.K., Sunny Homes K.K., Taiwan Chao Yang Chemical Co., Ltd., and Tokuyama Petrochemical Co., Ltd.

Respondent Showa Denko America, Inc.'s parent corporation is Showa Denko K.K. It has no subsidiaries.

## LIST OF OTHER INTERESTED PARTIES

In addition to Respondents Showa Denko K.K. and Showa Denko America, Inc., on whose behalf this brief is filed, other interested parties include the Petitioners (Janet, Alan and Mitchell Vaught) and the additional Respondents in this case, who are correctly identified in the caption. Sara D. Schotland of Cleary, Gottlieb, Steen & Hamilton, and Rowland Foster of Strasburger & Price, L.L.P. are counsel of record for Showa Denko K.K. and Showa Denko America, Inc., and Mr. Foster is counsel of record as well for the additional Respondents.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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No. 96-1951

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JANET L. VAUGHT, ALAN VAUGHT,
and MITCHELL VAUGHT,
*Petitioners,*

v.

SHOWA DENKO, K.K.; SHOWA DENKO AMERICA, INC.;
LEINER HEALTH PRODUCTS, INC.; PHARMATIVE CORP.;
GENERAL NUTRITION, INC.; GENERAL NUTRITION CORP.;
GENERAL NUTRITION PRODS., INC.;
WALGREEN CO.; and ECKERD HOLDINGS II, INC.,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## RESPONDENTS SHOWA DENKO, K.K. AND SHOWA DENKO AMERICA, INC.'S BRIEF IN OPPOSITION

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Respondents Showa Denko K.K. and Showa Denko America, Inc. hereby oppose the writ of *certiorari* filed by Petitioners Janet L. Vaught, *et al.*

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 107 F.3d 1137 (5th Cir. 1997). The opinion of the district court (Pet. App. 41-60) is not reported or available on Westlaw or LEXIS.

## JURISDICTION

The judgment of the court of appeals was entered on March 10, 1997. A petition for rehearing was denied on April 8, 1997. (Pet. App. at 34-35.) The petition for writ of *certiorari* was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioners seek review of the court of appeals' decision which, in applying Texas law, determined that the Texas statute of limitations applicable to personal injury claims is not tolled by the filing of a nationwide class action in federal court in another state.

### A. Statement of Facts and Proceedings.

Petitioners filed suit in Texas state court on April 28, 1993. Respondents removed the action to the United States District Court for the Southern District of Texas, Houston Division. (Pet. App. at 6.) In June 1994, the Panel on Multidistrict Litigation ordered the transfer of the case to the United States District Court for the District of South Carolina, for pre-trial consolidation with the nationwide L-Tryptophan litigation pending there (MDL No. 865). (*Id.*) In September 1995, the case was remanded from the South Carolina court to the District Court for the Southern District of Texas for further proceedings and trial. (*Id.*) The respondents later moved for summary judgment on limitations grounds. (*Id.*) The district court granted respondents' motion for summary judgment on limitations grounds and that decision was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit on March 10, 1997.

On appeal, the Fifth Circuit was called upon to address two state law issues involving the interpretation of Texas' statute of limitations: a question related to application

of the discovery rules (not presented in the instant petition for *certiorari*) and the question of whether under Texas law, the filing of a putative class action by a Maryland resident tolled the statute of limitations for Petitioners' state court personal injury claim.

In an L-Tryptophan case filed in Maryland, *see Rapoport v. Showa Denko America Inc.*, No. JH-90-518 (D. Md. filed Feb. 13, 1990), a motion was made for certification of a class. Certification of that class was denied by the MDL Judge to whom the case was transferred—the Honorable Matthew Perry, D.S.C. Columbia Division—on January 6, 1992. (Pet. at 5.) Petitioners rely on *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1947), a federal antitrust action, to argue that the limitations period was tolled during the time period during which the motion for class certication was pending in the *Rapoport* case. Federal courts sitting in diversity are obliged to apply state law to limitations questions. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980). The Fifth Circuit declined to apply *American Pipe* tolling to Petitioners' claims. The Fifth Circuit observed that the Texas Court of Appeals had specifically rejected class action tolling in another L-Tryptophan case. (Pet. App. at 12-13); *see Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex. App.—Amarillo 1995, *writ denied*).[1]

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[1] Petitioners' statement of facts is inaccurate in several respects. First, *Rapoport* was filed by a Maryland resident in federal court in Maryland, *see Rapoport v. Showa Denko America, Inc.*, No. JH-90-518 (D. Md. filed Feb. 13, 1990); the putative class action was then transferred to South Carolina, the transferee court for MDL-865, *In Re L-Tryptophan*. Second, there is no record support for the statement that Petitioner Janet Vaught refrained from filing a redundant lawsuit by virtue of "the text and spirt of Rule 23" as asserted in the Petition at p. 20. Nor is there record support for the proposition that as a result of *Vaught*, "thousands . . . of class claimants' cases are . . . prescribed." (Pet. at 10 (sic).) Nor do Respondents concede that Petitioners' action filed in April 1993 was timely under Texas' two-year statute if the filing of *Rapoport*

**B. The *American Pipe* Doctrine.**

In *American Pipe*, this Court held that "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' " the commencement of a class action tolls "the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 552-553, 554. The tolling doctrine thus encourages putative class members to rely on class actions and to refrain from individual actions; tolling preserves the timeliness of claims unless and until the action is denied.[2] This Court cautioned that class action tolling would apply only when the filing of a class action provided proper notice to defendants of the claims and claimants asserting them:

> [t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendant not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of

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tolled her claim. To the contrary, she still had time to file her suit after denial of class certification in *Rapoport* in January 1992, even assuming *arguendo* that tolling applied.

[2] *American Pipe* applied class action tolling to motions to intervene filed after the statute of limitations would otherwise have expired. In *Crown, Cork & Seal v. Porter*, 462 U.S. 345, 350-51 (1983), the rule was extended to the filing of separate individual actions in a "Title VII" litigation. In a third case, *Chardon v. Fumero Soto*, 462 U.S. 650, 662 (1983), also involving a federal cause of action (a civil rights claim where the federal statute provided no limitations period), this Court held that after class certification is denied, the time period for the individual plaintiff to bring suit was determined by state law (*i.e.*, state saving statutes).

> limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation.

414 U.S. at 554-555 (citation omitted). A trilogy of this Court's decisions has established that federal courts can toll statutes of limitations on *federal* law claims but these decisions do not require (or address) tolling of state causes of action such as personal injury claims.

**C. The Court of Appeals' Decision.**

In this case, the court of appeals observed that:

> diversity actions, such as the one at hand for product liability, involve state causes of action, where state law, of course, provides the rules of decision even in federal court. In fact, the Supreme Court has stated that generally, for diversity actions, a federal court should apply not only state statutes of limitation but also any accompanying tolling rules.

(Pet. App. at 27 (citation omitted).) Citing *Bell*, the court of appeals correctly determined that under Texas law, class action tolling applies only to property damage claims, not personal injury actions.[3] The *Bell* court had concluded:

> The basic premise of the *American Pipe* ruling is that a statute of limitations can be tolled while class allegations are pending, provided the defendant has notice of the type and potential number of the claims against it. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-94 n.14 (1977). In *Grant* [*v. Austin Bridge Constr. Co.*, 725 S.W.2d 366 (Tex. App.—Houston 1987, no writ)], the suit involved

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[3] Petitioners misleadingly cite *Bell* without observing that a writ was denied by the Texas Supreme Court, although they are aware the writ was denied; indeed, this fact was noted by Respondents in their brief before the Fifth Circuit. *See Brief for Appellees* at 4 n.2, *Vaught v. Showa Denko K.K.*, 107 F.3d 1137 (5th Cir. 1977).

> was filed in a Texas state court by plaintiffs who were a readily discernible group of people claiming injury to certain property rather than personal injury. That distinction is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit. For us to hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in *American Pipe*, would be an extension not warranted by the *Grant* decision and we refuse to do so.

899 S.W.2d at 758.

## REASONS FOR DENYING THE WRIT

The petition should be denied. Sitting in diversity, federal courts apply state law to determine statute of limitations rules, including tolling rules. There is no conflict among the federal circuits as none of the other courts of appeals which have considered the question of whether to apply class action tolling have applied Texas law. Further, contrary to Petitioners' claims, the Fifth Circuit's decision does not conflict with *American Pipe* which applied class action tolling in the context of a federal cause of action (antitrust litigation).

### I. THE FIFTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS DECISIONS, NOR IS IT CONTRARY TO THIS COURT'S DECISION IN *AMERICAN PIPE*.

#### A. There Is No Conflict Among The Circuits.

Petitioners urge as their primary argument in support of review that the Fifth Circuit's decision conflicts with *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248 (10th Cir.), *cert. denied*, 513 U.S. 917 (1994), and *Adams Pub. Sch. Dist. v. Asbestos Corp., Ltd.*, 7 F.3d 717 (8th Cir. 1993). There is no direct conflict. In

*Sawtell*, the Tenth Circuit found that it "need not resolve" whether class action tolling applied in a personal injury action because (1) Mrs. Sawtell was a New Mexico resident, (2) the Rule 23 class action was brought only on behalf of Minnesota residents, and (3) "Mrs. Sawtell was not a putative member of the Minnesota class action." 22 F.3d at 253. Thus, the *Sawtell* court did not apply *American Pipe* tolling, nor did the case involve Texas law. In *Adams*, a North Dakota statute expressly authorized extension of time for suits related to removal of asbestos from public buildings notwithstanding otherwise applicable limitations periods.[4] This statute provided evidence of the North Dakota legislature's intent to avoid time barring of asbestos property damage claims. *Adams* is in fact consistent with *Vaught*: the Eighth Circuit ruled that, sitting in diversity, it was obliged to apply North Dakota law, *see* 7 F.3d at 719, just as the *Vaught* court applied Texas law. Moreover, *Adams* concerned the issue of whether *North Dakota law* avoided tolling a *property damage* claim; thus the case did not concern tolling in mass personal injury litigation such as the L-Tryptophan litigation.

Accordingly, there is no direct conflict among the circuits with respect to the *Vaught* decision and the decision of any other circuit court on a matter of federal law.

### B. The Fifth Circuit's Decision Does Not Conflict With *American Pipe*.

*American Pipe* concerned the tolling of statutes of limitations where a class action is filed with respect to federal law claims. *American Pipe* does not address the tolling of state limitations periods on state law claims. As discussed further below, nothing in *American Pipe* overrides *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which requires federal courts to apply state law on statute of limitations questions when sitting in diversity. As the Texas Court of Appeals observed in *Bell*, a case involving

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[4] *See* N.D. Cert. Code 28.01 (1993).

class action tolling of personal injury claims, state law governs class action tolling of state law claims:

> We do not agree that *American Pipe* operates to toll our state statute of limitations. That case involved an interpretation of Rule 23 of the Federal Rules of Civil Procedure and concerned the question of whether a federal statute of limitations was tolled for the purpose of filing a federal claim. Under the doctrine of the hoary case of *Erie Railroad Co.* and its progeny, where a claim is derived from state law, as is appellant's suit, state law governs the tolling of the statute of limitations.

*Bell*, 899 S.W.2d at 757 (citations omitted).

Moreover, the "fair notice" requirement of *American Pipe* counsels against class action tolling in mass personal injury litigation. *American Pipe* states that for class action tolling to apply, the class action must give the defendant notice sufficient to identify the evidence necessary to defend its claims. *See* 414 U.S. at 554-55. Absent the fair notice requirement, defendants would be prejudiced by class action tolling. In a concurring opinion, Justice Blackmun emphasized the central role that notice plays in *American Pipe* tolling. After warning that *American Pipe* must not be read as encouragement to file class actions solely to protect dilatory plaintiffs who are late to file suit, Justice Blackmun admonished that only plaintiffs whose claims "concern the same evidence, memories, and witnesses as the subject matter of the original class suit" should benefit from class action tolling. 414 U.S. at 562 (Blackmun., J., concurring). This way "the defendant will not be prejudiced by later intervention, should class relief be denied." *Id.*

In mass personal injury actions, the notice requirement is not satisfied and class action tolling is inappropriate. As the California Supreme Court has observed:

> [B]ecause personal-injury mass-tort class-action claims can rarely meet the community of interest require-

> ment in that each member's right to recover depends on facts peculiar to each particular case, such claims may be presumptively incapable of apprising defendants of the "substantive claims being brought against them" . . . a prerequisite, in our view, to the application of *American Pipe*.

*Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 937-938 (1988). The key facts underlying personal injury mass tort claims are unique to each plaintiff:

> The major elements in tort actions for personal injury—liability, causation, and damages—may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation.

*Jolly*, 751 P.2d at 936 (citations omitted).[5]

Because personal injury claims turn on plaintiff-specific facts, the MDL Court ruled in *Rapoport* that a class action was not appropriate for L-Tryptophan. Far from being compelled by *American Pipe*, class action tolling would not comport with its fair notice requirement as the filing of *Rapoport* did not give Showa Denko the identity of potential plaintiffs or enable Showa Denko to identify and preserve relevant evidence (medical providers, medical records, damages witnesses, etc.).

Accordingly, *certiorari* is not warranted on the basis that the court of appeals' decision conflicts with Supreme Court precedent.

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[5] *See also Ganousis v. E.I. du Pont de Nemours & Co.*, 803 F. Supp. 149, 155 (N.D. Ill. 1992) (noting that argument that *American Pipe* does not apply in mass tort personal injury action because defendants do not have the "requisite information about the prospective claims . . . appear[s] to have some force and [is] buttressed by some respectable authority"); 7B Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice and Procedure* § 1783 (2d ed. 1986) ("[A]llowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule").

## II. THE COURT OF APPEALS' DECISION IS CORRECT.

The Fifth Circuit's decision is also correct. The court properly applied state law to determine whether Texas would toll class actions in a mass personal injury lawsuit and concluded, based on *Bell*, that the filing of *Rapoport*, a putative class action in Maryland,[6] did not toll the Texas statute of limitations.

### A. Under *Erie*, Federal Courts Sitting In Diversity Must Apply State Statutes Of Limitations, Including Tolling Rules.

*American Pipe* was an antitrust case in which the claim arose under federal law. Post-*Erie*, federal courts may not displace state law on statutes of limitations applicable to state law claims. In *Armco Steel*, this Court held that federal courts must apply state tolling rules because they are an "integral part . . . of the state law cause of action."[7] 446 U.S. at 746. This Court observed:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

446 U.S. at 753. The rule that federal courts sitting in diversity must borrow state limitations policies compares with the *Erie* doctrine:

> If, even in areas of *choice*, federal courts unwaveringly apply state tolling rules to borrowed limitations

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[6] *Rapoport* was transferred to the MDL court in South Carolina.

[7] *See also Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980).

> periods, the existence of an *obligation* to do so when the state periods apply of their own force is compelling. Otherwise, the fortuity of diversity of citizenship would enable parties to alter, radically, the limitations periods applicable to state law claims. When a plaintiff of citizenship diverse to the defendant cannot be found, the otherwise applicable state limitations period would govern. Nonetheless, if one can be found (and since mass torts often affect many people across state lines, a search for a suitable plaintiff is often not fruitless), the state's law will be displaced by a federal tolling rule. This divergent outcome, turning solely on the availability of federal diversity jurisdiction, is intolerable under our federalism.

Mitchell A. Lowenthal & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 565 (1996) (footnote omitted);[8] *see Guaranty Trust Co. v. York*, 326 U.S. 99, 111-12 (1945) (federal court cannot use its equity jurisdiction to hear a diversity suit that would be barred by the state's statute of limitations if brought in state court). In *York*, Justice Frankfurter found that state limitations periods are for state law claims a significant part of the "legal rules [which] determine the outcome of litigation."[9] 326 U.S. at 109; *see also In re "Agent*

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[8] Mr. Lowenthal is counsel for Showa Denko in this action.

[9] The cases cited by Petitioners do not support their position that federal courts sitting in diversity may disregard state tolling rules. In *Tomanio*, 446 U.S. at 485, this Court held that other courts should ordinarily borrow state limitation periods including tolling rules to supply the limitation period for *federal* action when there is no specifically stated federal statute of limitations. *A fortiori*, state limitations periods should be borrowed for state class actions. *See* Lowenthal & Feder, *supra*, at 565. In *Hanna v. Plumer*, 380 U.S. 460 (1965) this Court held that the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. In *Armco Steel*, this Court distinguished *Hanna* and ruled clearly that "[t]here is simply no reason why, in the

*Orange" Prod. Liab. Litig.*, 818 F.2d 210, 213 (2nd Cir. 1987) ("The limitation periods of *American Pipe* and *Crown, Cork* were derived from federal statutes. Here we are dealing with Hawaii's limitation statutes. . . . [I]t is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent."), *cert. denied*, 484 U.S. 1004 (1988). Tolling rules are an integral part of state statutes of limitations. *See Cook v. G.D. Searle & Co., Inc.*, 759 F.2d 800, 803 (10th Cir. 1985) (federal court sitting in diversity must apply state limitations period and related tolling rules (citing *Tomanio*, 446 U.S. at 485-86)).

Here, the court of appeals appropriately followed Texas law, namely, *Bell v. Showa Denko K.K.*, 899 S.W.2d at 757-58. The *Bell* court contrasted the applicability of *American Pipe* in property damage litigation following *Grant v. Austin Bridge Constr. Co.*, 725 S.W. 366 (Tex. App.—Houston 1987, no writ). *See Bell*, 899 S.W.2d at 758. As the *Bell* court noted, *Grant* involved a discernible group of people claiming property damage, not personal injury, a distinction of central importance in determining whether defendants receive fair notice by the filing of a class suit. In *Grant*, by marked contrast to L-Tryptophan litigation, the putative class was readily identifiable and the damages sought were clearly defined. *See Grant*, 725 S.W.2d at 367.[10] *Bell*'s distinction between personal

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absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." 446 U.S. at 753.

[10] *Bell* is consistent with a line of decisions which recognize that while property damages cases are appropriate for class certification, personal injury actions generally are not, due to myriad plaintiff-specific distinctions in medical condition, illness, exposure, personal facts including age and lifestyle, and damages. *See In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa.

injury and property damages tolling is well-grounded and supported by California precedent.[11]

Petitioners cannot avoid the on-point *Bell* holding by dismissing it as "pure dicta." Dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundation of the holding, that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). In fact, the *Bell* court's decision that a Texas court would not apply class action tolling was an alternative holding. *See* 899 S.W.2d at 757. The tolling issue was thoroughly considered and had the benefit of full briefing.[12]

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1980); *Becker v. McMillin Constr. Co., Inc.*, 277 Cal. Rptr. 491 (Cal. Ct. App. 1991).

[11] While property damages claims may appropriately be subject to class action tolling, mass tort personal injury claims are not—due to differences in the notice afforded to defendants when a class action is filed as to individual plaintiffs' particularized claims. *See Becker*, 277 Cal. Rptr. at 496. The *Becker* court distinguished personal injury claims and explained why, for those claims, a tolling argument could not be sustained:

> As to the personal injury claim, it is clear that *Jolly* controls: the same causation and damages variables as to various plaintiffs' medical histories and injuries make a finding of 'common questions of law and fact' impossible, and the giving of any meaningful notice of the substantive claims to defendants doubtful. Similarly, it would be difficult for the defendant to identify the 'number and generic identities' of potential plaintiffs.

277 Cal. Rptr. at 496 (citation omitted).

[12] *See* Brief for Appellants, *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App.—Amarillo 1995, *writ* denied). Indeed, the *American Pipe* issue was argued by Bell in her futile writ for certiorari to the Texas Supreme Court. The Vaughts cannot complain about the adequacy of the briefing as their co-counsel at the trial court level, Kathleen Robbins, Esq., was one of Bell's co-counsel.

**B. Other L-Tryptophan Cases Support The *Vaught* Result.**

In *Whall v. Showa Denko K.K.*, No. 635307 (Cal. Super. Ct. Oct. 20, 1993),[13] the court rejected plaintiffs' argument that *American Pipe* tolling should apply to an L-Tryptophan case. Citing *Jolly*, the court ruled that in mass personal injury tort actions, including the L-Tryptophan cases, given concerns of fairness of notice to defendants, "the tolling principles of *American Pipe* . . . will not apply." *Whall*, slip op. at 1-2.

Petitioners rely, as below, on an L-Tryptophan case in New Mexico Federal District Court, *Kennedy v. Showa Denko K.K.*, which applied equitable tolling based on an "Erie guess" as to the applicability of *American Pipe* under New Mexico law. (*See* Pet. App. at 41-60.) Petitioners' reliance on *Kennedy* is misplaced. First, *Kennedy* recognizes that "[a] federal court sitting in diversity must apply the law of the state in which it sits." (Pet. App. at 52 (citations omitted).) In his decision to apply *American Pipe*, Judge Mechem seems to have been unaware of relevant precedent. Judge Mechem did not discuss *Whall* and *Bell*. He ignored the notice requirement that was central to the Supreme Court's analysis in *American Pipe*.[14] *Kennedy* does not support Petitioners' position because it recognizes that a federal court must apply state statute of limitations law including tolling. In Texas, unlike New Mexico, the state court of appeals has addressed the issue

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[13] This decision has not been reported and it is not available via Westlaw or LEXIS. Copies have been lodged with the Clerk of this Court.

[14] Judge Mechem mistakenly relied on *Becker* as extending class action tolling to mass tort actions, although as noted above the *Becker* court followed *Jolly* recognizing that mass *personal injury* actions are not suitable for class action tolling. The *Becker* court distinguished *property damage* claims from personal injury mass tort claims because "the identity and number of potential claimants were sufficiently ascertainable [in *Becker*] to notify defendant of all potential claims within the limitations period." *Becker*, 277 Cal. Rptr. at 496.

of class action tolling and does not allow tolling in mass personal injury actions.

In another L-Tryptophan case, not cited by petitioners, *Barela v. Showa Denko K.K.*, No. Civ. 93-1469, 1996 U.S. Dist. LEXIS 7830 (D.N.M. Feb. 28, 1996), the court held *American Pipe* did not apply. First, New Mexico (like Texas) has no compelling interest in furthering the economy and efficiency of a federal court sitting in another state that would override the local statute of limitations and the forum state's interest in protecting against stale claims. *Barela,* 1996 U.S. Dist. LEXIS 7830 at *14-*16. It would be novel and erroneous for a court sitting in New Mexico (or Texas) to adopt *American Pipe* to toll its own statute of limitations based on a class action filed in a foreign jurisdiction. *See Barela,* 1996 U.S. Dist. LEXIS 7830 at *16. Judge Hansen held that *American Pipe* tolling should not apply to mass personal injury tort cases such as the L-Tryptophan cases where the class action did not give defendants adequate notice of individual claims. *See Barela,* 1996 U.S. Dist. LEXIS 7830 at *16-*17 (citing *Bell* and *Jolly*).

As the district court observed in *Barela,* "the federal interests encountered in *American Pipe* are not as strong when a federal court sits in diversity." 1996 U.S. Dist. LEXIS 7830 at *15 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 213). The court followed *Carter v. Washington Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985), in determining that there is "no remotely compelling federal interest in overriding the local statute of limitations" in personal injury suit between private parties. *Barela,* 1996 U.S. Dist. LEXIS 7830 at *15-*16. The *Barela* court concluded: "This Court does not believe that any overriding federal interest in class actions mandates application of *American Pipe* in diversity cases in the absence of applicable state tolling law." *Barela,* 1996 U.S. Dist. LEXIS 7830 at *16.

The underlying rationale of *American Pipe*—the federal interest in the federal class action statute and prevention of a multiplicity of actions in federal court—does not apply to a personal injury suit filed in state court by a Texas resident. There is no reason why the pendency of a petition for class certification filed by a Maryland resident in Maryland should outweigh Texas' strong interest in preventing the assertion of stale claims. Otherwise Texas' statute of limitations would be disregarded and subject to indefinite extension whenever a class action in an arguably related matter was filed anywhere in the country, without regard to whether or not the class action was filed in good faith or actively pursued.

## CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

SARA D. SCHOTLAND
*Counsel of Record*
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

ROWLAND FOSTER
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

*Attorneys for Respondents*
*Showa Denko K.K. and Showa Denko America, Inc.*